

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
2009 MSPB 113**

Docket No. AT-315H-08-0872-I-1

**Cheri W. Dodson,
Appellant,
v.
Department of the Navy,
Agency.
June 17, 2009**

Cheri W. Dodson, Jonesboro, Georgia, pro se.

Major Jonathan H. Vaughn, Quantico, Virginia, for the agency.

BEFORE

Neil A. G. McPhie, Chairman
Mary M. Rose, Vice Chairman

OPINION AND ORDER

¶1 The appellant has filed a timely petition for review of an initial decision that dismissed her appeal for lack of jurisdiction. For the reasons set forth below, we GRANT the petition for review, VACATE the initial decision, and REMAND the matter to the regional office for further adjudication consistent with this Opinion and Order.

BACKGROUND

¶2 Effective August 15, 2008, the agency terminated the appellant from her YB-02 Legal Technician position because of her work performance and conduct, including her inability or unwillingness to complete assigned tasks in a timely

manner and unprofessional conduct toward fellow employees. Initial Appeal File (IAF), Tab 7, Subtabs 4d, 4b. The appellant filed this appeal. IAF, Tab 1. The administrative judge notified her that the Board might not have jurisdiction because of her probationer status and ordered her to file evidence and argument to establish jurisdiction as set forth at [5 C.F.R. § 315.806](#). IAF, Tab 2. The appellant responded, but she made no allegations of fact that would support a finding of jurisdiction under [5 C.F.R. § 315.806](#). IAF, Tabs 5, 6. The agency moved to dismiss the appeal for lack of jurisdiction. IAF, Tabs 7, 8. The appellant did not expressly request a hearing, although she identified individuals who she wished to testify. IAF, Tab 5. Without holding a hearing, the administrative judge issued an initial decision dismissing the appeal for lack of jurisdiction. IAF, Tab 10.

¶3 On petition for review, the appellant argues that the administrative judge erred in dismissing the appeal for lack of jurisdiction because she completed a probationary period while she was employed with the federal government beginning in 1983 and prior to transferring to the Federal Deposit Insurance Corporation (FDIC) in 1987. She further states that she resigned from her position with FDIC in 2005 to accept a buyout package. She has submitted copies of her SF-50s documenting her appointment to and resignation from FDIC. Petition for Review File (PFRF), Tabs 1, 3. The agency has responded in opposition to the petition for review. PFRF, Tab 4.

ANALYSIS

¶4 The Board's jurisdiction is not plenary; it is limited to those matters over which it has been given jurisdiction by law, rule or regulation. *Maddox v. Merit Systems Protection Board*, [759 F.2d 9](#), 10 (Fed. Cir. 1985). Under [5 U.S.C. § 7511\(a\)\(1\)\(A\)](#), an employee with a right to appeal to the Board includes an individual in the competitive service: (i) who is not serving a probationary or trial period under an initial appointment; or (ii) who has completed 1 year of current continuous service under other than a temporary appointment limited to 1 year or

less. *McCormick v. Department of the Air Force*, [307 F.3d 1339](#), 1341 (Fed. Cir. 2002).

¶5 The Standard Form 50 (SF-50) documenting the appellant’s appointment indicates that she was appointed to her YB-02 Legal Technician position effective May 12, 2008, subject to completion of a 1-year probationary period. IAF, Tab 7, Subtab 4f. The SF-50 also indicates that the nature of the action was “[r]einstatement career” under the legal authority of “Reg[.] 9901.516” and that her tenure was “[p]ermanent.” *Id.* The certificate of eligible candidates from which the appellant was selected indicates that she was a non-competitive candidate. IAF, Tab 7, Subtab 4h. Another SF-50 shows that she was terminated effective August 15, 2008. IAF, Tab 7, Subtab 4b. The appellant has not alleged that she had 1 year of current continuous service when the agency terminated her on August 15. *See Smith v. Department of Defense*, [106 M.S.P.R. 228](#), ¶ 11 (2007) (the phrase “current continuous service” in [5 U.S.C. § 7511](#)(a)(1)(A)(ii) means a period of service immediately preceding an adverse action without a break in federal civilian employment of a workday). Her prior service appears to have ended in 2005 and thus was not current service. She has not alleged that she had any federal service between 2005 and May 12, 2008. Thus, it is clear that she was not an employee with a right to appeal under subsection (ii).

¶6 The question remains whether the appellant meets the definition of “employee” at subsection (i), i.e., an individual who is not serving a probationary or trial period under an initial appointment. The administrative judge found that the appellant was serving a probationary period and that the agency’s regulations¹ provide for a new probationary period when appointed to a position under the National Security Personnel System (NSPS). Initial Decision (ID) at 4, 6-7. The

¹ The regulations discussed herein were actually jointly issued by the Department of Defense and the Office of Personnel Management. We refer to them as the “agency’s regulations” for ease of reference, and in recognition of the fact that the respondent agency, the Department of the Navy, is a component of the Department of Defense. *See* [10 U.S.C. § 111](#)(b)(7).

appellant argues on petition for review that she completed her probationary period under her initial appointment prior to her appointment to the position with the FDIC and was not required to serve another probationary period. PFRF, Tab 3. The SF-50 documenting her FDIC appointment supports her allegation that she completed a probationary period.² *Id.*

¶7 The agency argues that it acted within its authority under [5 U.S.C. § 9902](#) and [5 C.F.R. §§ 9901.512](#) and 9901.516 in imposing a probationary period on the appellant, whose position was covered by the NSPS. PFRF, Tab 4; IAF, Tab 7, Subtab 4f. Congress enacted legislation authorizing the agency to establish by regulation and “[n]otwithstanding any other provision of [part III of Title 5],” a human resources management system, i.e., the NSPS. [5 U.S.C. § 9902](#). The statute listed various sections of Title 5 that the agency could not waive.³ Under the statute as originally enacted, there was no limitation on the agency’s authority to waive chapter 75. Under [5 U.S.C. § 9902](#)(h), the agency had the authority to establish an appeals process for employees who are under the NSPS and to issue regulations to implement the appeals process. [5 U.S.C. § 9902](#)(h)(1)-(2). The statute provided that an employee against whom an adverse action was taken who “is not serving under probationary period as defined by regulations established under paragraph (2)” had certain rights to have the full Board review a final

² On review, the appellant has submitted for the first time evidence that she completed a probationary period some time before 1987. PFRF, Tab 3. Ordinarily, under [5 C.F.R. § 1201.115](#), the Board will not consider evidence submitted for the first time with the petition for review absent a showing that it was unavailable before the record was closed despite the party's due diligence. *Avansino v. U.S. Postal Service*, [3 M.S.P.R. 211](#), 214 (1980). Nevertheless, because the acknowledgment order did not specifically inform the appellant, who is pro se, that she had the burden of proving that she was not serving a probationary period, we have considered it. IAF, Tab 2. An appellant must receive explicit information on what is required to establish an appealable jurisdictional issue. *Burgess v. Merit Systems Protection Board*, [758 F.2d 641](#), 643-44 (Fed. Cir. 1985).

³ These include sections 2301, portions of section 2302, subparts A, B, E, G, and H of Title 5, Part III, and chapters 41, 45, 47, 55 (with some exception not here relevant), 57, 59, 71, 72, 73, 79, and 99. [5 U.S.C. § 9902](#)(b)(3), (d).

decision resulting from the appeals process established by the agency. [5 U.S.C. § 9902](#)(h)(4). Pursuant to its statutory authority, the agency issued regulations that “waive or modify various statutory provisions that would otherwise be applicable to affected [agency] employees.” [5 C.F.R. § 9901.101](#)(a). Under the regulations, an “initial probationary period” is defined as “the period of time . . . immediately following an employee’s appointment, during which an authorized management official determines whether the employee fulfills the requirements of the position to which assigned.” [5 C.F.R. § 9901.103](#) (2008). The regulations further provide that the agency may establish initial probationary periods of at least a year. [5 C.F.R. § 9901.512](#)(a) (2008). Section 9901.516 of 5 C.F.R. (2008), Internal Placement, provides that the agency “may prescribe implementing issuances regarding . . . reinstatement . . . of individuals or employees into or within NSPS.” The agency promulgated implementing issuances pursuant to [5 C.F.R. § 9901.512](#) (2008) to prescribe the conditions for the probationary period. Under the Department of Defense Civilian Personnel Manual, SC1950.5.2.1.4, *Reappointment to Federal Service* (Apr. 28, 2006 edition), a person who has not successfully completed an initial NSPS probation period is required to complete a new probationary period if appointed or reappointed to an NSPS position. IAF, Tab 7, Subtab 4l. Subpart G of 5 C.F.R. Part 9901 (2008) sets forth the procedures for taking an adverse action against an employee, but excludes an action taken against an employee during an initial probationary period established under section 9901.512(a). Employees covered by Subpart G are also covered by Subpart H, providing for appeal rights to the Board. 5 C.F.R. § 9901.805(a) (2008). The agency relies on these statutory and regulatory provisions to argue that the appellant was serving a probationary period in her initial NSPS appointment and that she therefore has no right to appeal her termination to the Board. PFRF, Tab 4; IAF, Tab 8.

¶8 The agency fails to acknowledge, however, that Congress amended [5 U.S.C. § 9902](#) effective January 28, 2008, prior to the appellant’s appointment.

See National Defense Authorization Act (NDAA) for Fiscal Year 2008, Pub. L. No. 110-181, § 1106, 122 Stat. 3, 351, 356 (2008). Under the statute as amended, the agency retains the authority to “establish, and from time to time adjust, a human resources management system for some or all of the organizational or functional units of the [agency],” but that authority was limited by the amendment so that the system could no longer waive 5 U.S.C. chapter 75 (among other provisions). Pub. L. No. 110-181, § 1106(a). The amendments to section 9902 further provide that “[a]ny rules and implementing issuances that were adopted prior to the date of the enactment of this Act shall be invalid to the extent that they are inconsistent with the requirements of section 9902 of title 5, United States Code, as amended by this section.” Pub. L. No. 110-181, § 1106(b)(3). The provisions of [5 U.S.C. § 9902\(h\)](#), establishing procedures for appealing adverse actions, are no longer part of [5 U.S.C. § 9902](#). As a result of these amendments, the agency’s regulations at 5 C.F.R. Part 9901, Subpart G, Adverse Actions, and Subpart H, Appeals, became invalid as of January 28, 2008. We also note that, after the appellant’s appointment and termination, but “[b]ased on the changes” made by Pub. L. No. 110-181 prior to her appointment, the agency “delete[d]” Subpart E of 5 C.F.R. Part 9901, the purported authority under which the appellant was required to serve NSPS probation. 73 Fed. Reg. 56,346 (daily ed. Sept. 26, 2008).

¶9 Based on the foregoing, it does not appear that the NSPS regulations upon which the agency relied in requiring the appellant to serve probation can be given effect, inasmuch as those regulations appear to limit the appellant’s adverse action appeal rights. Under government-wide regulations at [5 C.F.R. § 315.801\(a\)](#), the first year of service of an employee who is given a career or career-conditional appointment is a probationary period when the employee was appointed from a competitive list of eligibles pursuant to [5 C.F.R. § 315.301](#). The first year of service is also a probationary period when the employee “was reinstated under subpart D of this part unless during any period of service which

affords a current basis for reinstatement, the employee completed a probationary period or served with competitive status under an appointment which did not require a probationary period.” [5 C.F.R. § 315.801](#)(a)(2) (emphasis supplied). If the appellant’s 2008 appointment met the criteria of [5 C.F.R. § 315.801](#)(a)(2), then the appellant apparently was an “employee” with adverse action appeal rights under [5 U.S.C. § 7511](#)(a)(1)(A)(i) when the agency terminated her appointment. Nevertheless, the record has not been developed with the above-described issues in mind, so we cannot resolve them at this stage.

ORDER

¶10 Accordingly, we REMAND this appeal to the Atlanta Regional Office for further adjudication consistent with this opinion. The administrative judge shall afford the parties an opportunity to submit evidence and argument on the issue of whether the appellant was properly serving a probationary period when she was terminated. If raised by the agency, the administrative judge should also consider whether the decisions in *Thompson v. Department of the Treasury*, [100 M.S.P.R. 545](#), ¶¶ 8-9 (2005), and *Hughes v. Social Security Administration*, [99 M.S.P.R. 67](#), ¶ 7 (2005), which discuss the requirements for an enforceable probationary period agreement, affect the appellant’s rights. The administrative judge shall afford the appellant a jurisdictional hearing, if she requests one and if there are factual matters in dispute the resolution of which could be the basis for determining jurisdiction.

FOR THE BOARD:

William D. Spencer
Clerk of the Board
Washington, D.C.